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No. 00-1875

In The

Supreme Court of the United States

TIME WARNER ENTERTAINMENT COMPANY, L.P., *et al.*,

Petitioners,

v.

SIX FLAGS OVER GEORGIA, LLC, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Georgia

BRIEF FOR SIX FLAGS OVER GEORGIA, LLC, *ET AL.*, IN OPPOSITION

JAMES E. BUTLER, JR.
GEORGE W. FRYHOFER III
BUTLER, WOOTEN, SCHERFFIUS, FRYHOFER, DAUGHTERY & SULLIVAN
2719 Buford Highway
Atlanta, Georgia 30324
(404) 321-1700

GERALD DAVIDSON, JR.
ANDERSEN, DAVIDSON & TATE
P.O. Box 2000
Lawrenceville, Georgia 30246
(770) 822-0900

EMMET J. BONDURANT II
Counsel of Record
H. LAMAR MIXSON
MICHAEL B. TERRY
JOSHUA F. THORPE
BONDURANT, MIXSON & ELMORE, LLP
3900 One Atlantic Center
1201 W. Peachtree St., NW
Atlanta, Georgia 30309
(404) 881-4100

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER-STATEMENT AND REORDERING OF THE QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to grant, vacate, and remand a case coming here from a Georgia appellate court where Petitioners now challenge the standard of review on appeal of the trial court's determinations about a punitive damages award, but where that challenge was never presented to or decided by the Georgia appellate court because Petitioners affirmatively requested the standard of review that the appellate court applied.

2. Whether an award of punitive damages is invalid under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), where the underlying breaches of fiduciary duty are clearly reprehensible, where such conduct could trigger severe criminal and civil penalties that include treble damages, and where the ratio of punitive to compensatory damages is only 1.3 to 1, but where the Georgia court did not expressly compare this punitive damages award to comparable civil and criminal penalties because Petitioners never presented that issue to the Georgia court by asking it to draw that comparison.

3. Whether this Court has jurisdiction to review a notice-based due process challenge to the imposition of punitive damages for conduct that was illegal under state law where that due process challenge was neither presented to nor decided by the Georgia court and where the Georgia court found that Petitioners had waived any challenge to liability for that conduct.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents Six Flags Over Georgia, LLC, Six Flags Fund, Ltd. (L.P.), and George DeRoy, as Trustee of Six Flags Claims Trust, state the following:

Respondent Six Flags Fund, Ltd. (L.P.) owns 99% of the membership interests in respondent Six Flags Over Georgia, LLC ("Flags"). No publicly held company directly owns 10% or more of the membership interests in Flags.

Respondent Six Flags Fund, Ltd. (L.P.) ("Fund") is a limited partnership. Its managing general partner is the Salkin Family Trust, created by declaration of trust dated May 15, 1980, Avram Salkin and Dorothy Salkin, co-trustees. The only corporate general partner of Fund is SFG, Inc., a California corporation, which is the non-managing general partner and owns a 0.1% partnership interest in Fund. SFOG Acquisition A, Inc. owns a 17.1% special limited partnership interest in Fund, and SFOG Acquisition B, L.L.C. owns an 8.2% special limited partnership interest in Fund. Upon information and belief, Six Flags, Inc. (formerly known as Premier Parks Inc.) and AOL Time Warner Inc. may directly or indirectly own some or all of SFOG Acquisition A, Inc. and SFOG Acquisition B, L.L.C. AOL Time Warner Inc. and Six Flags, Inc. are publicly held.

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BRIEF FOR SIX FLAGS OVER GEORGIA, LLC, *ET AL.*, IN OPPOSITION

Respondents Six Flags Over Georgia, LLC, Six Flags Fund, Ltd. (L.P.), and George DeRoy, as Trustee of Six Flags Claim Trust, respectfully submit this brief in opposition to the petition for a writ of certiorari.

INTRODUCTION

The petition provides a woefully incomplete account of both the procedural history of this case and the record evidence.

As the Court of Appeals held, the "clear and convincing" evidence in this case demonstrates that Petitioners "consciously and intentionally disregarded" their fiduciary duties to Respondents when Petitioners "carried out a plan to depress the value" of the Six Flags Over Georgia amusement park "by under-investing in it and then withholding information so that [they] could acquire the park at a discount." Pet. App. 34a, 13a.

Petitioners, however, do much more than simply rewrite the facts found by the jury and the Court of Appeals in order to create evidentiary support where none exists. Their petition is virtually silent on – and therefore totally fails to satisfy their obligations under – Rule 14.1(g)(i) of this Court's Rules. That Rule requires them "to show that the federal question[s]" they raise in the petition were "timely and properly raised" in the Georgia courts.

Their abject failure to do this is particularly egregious with respect to Petitioners' Question 3 (reordered as Question 1 in this opposition) because Petitioners' goal is to join this case to the recent decision in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 1678 (2001), and thereby to obtain a GVR. Questions 1 and 2 of the petition (reordered as Questions 2 and 3 here), even had they been properly presented to the Georgia courts, would be of no conceivable interest to

this Court. In *Cooper*, the Court held that the United States Constitution commands federal appellate courts to review *de novo* the trial court's determinations about a punitive damages award. The reality, however, is that the *Cooper* issue was never in this case and was never presented to or decided by the Georgia court. In fact, Petitioners *elected* not to present any *Cooper* issue when they requested that the Court of Appeals apply the very "abuse of discretion" standard which they now challenge. Accordingly, this Court has no jurisdiction to grant, vacate, and remand on the *Cooper* question.

To achieve their goal of obtaining a GVR based on *Cooper*, Petitioners have run roughshod over this Court's long-established rules on proper presentation both in their Application for Stay and in their petition. Faced with competing versions of the case and facts, without any record, and without the specter of any irreparable harm to Respondents were a stay to be granted, it is not surprising that this Court granted a stay.[1]

At the certiorari stage, however, Petitioners' advantages evaporate, and this Court must fully consider its jurisdiction.[2] This explains Petitioners' flight from *Cooper* and from their prior representations to this Court. Since their Application for Stay, the *Cooper* issue has gone from being first to third on Petitioners' list – and for good reason. There has never been any *Cooper* issue in this

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[1] Petitioners paid the compensatory damages award, leaving a bond almost twice the size of the remaining punitive damages award. In addition, the punitive damages award earns post-judgment interest at 12% per annum. *See* Application for Stay at 23-24, No. A-725 (filed Feb. 21, 2001) (hereinafter "Stay App.").

[2] Petitioners cannot suggest that the stay preordains a grant of certiorari. Their Application for Stay cited 11 cases in which this Court denied certiorari after stays had been granted. *See* Stay App. at 11 & n.7.

case, and Petitioners are not entitled to a GVR or any other relief.

Because Petitioners' attempt to create a *Cooper* question is transparently the gravamen of their petition, Respondents deal with that question first, and then turn to Petitioners' other two questions, which exhibit similar presentation problems and are otherwise clearly not certworthy.

JURISDICTION

As discussed fully in the reasons for denying the writ (*see infra* pp. 11-20, 24-25, 27-28), this Court lacks jurisdiction under 28 U.S.C. § 1257(a) because the federal questions Petitioners now raise were not presented to or decided by the Georgia Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of federal and Georgia statutes, and of the Georgia Constitution, are reproduced at Resp. App., *infra*, 1a-10a.

STATEMENT OF THE CASE

1. Between 1991 and 1997, Petitioners flagrantly abused their positions as general partner (or entities in control of that partner) of the Six Flags theme park in Atlanta, Georgia. They engaged in myriad intentional, wrongful acts in clear contravention of the fiduciary duties they owed to their partners. At the heart of their scheme was "a plan to under-invest in and thereby depress the value of the Georgia park" so that Petitioners could "acquire the park at a discount" once the

partnership agreement between Petitioners and Respondents expired in 1997. Pet. App. 32a, 13a, 8a.[3]

Internal memoranda and presentations revealed that Petitioners consciously planned to "milk" the Atlanta park by decreasing capital expenditures as the partnership agreement approached expiration. Pet. App. 9a.[4] Petitioners repeatedly assert that they were required by the partnership agreement to invest only $800,000 per year in capital improvements to the park, but the Court of Appeals explicitly rejected that interpretation of the partnership agreement as a matter of state law. As the Court of Appeals explained, not only did their devious strategy constitute an objective violation of Petitioners' "duty to act in good faith in making [capital improvement] decisions," but "the evidence shows that [Petitioners themselves] *never interpreted* the capital expenditures provision to mean they only had to invest $800,000 per year." Pet. App. 16a, 19a (emphasis added).

A clear example of Petitioners' scheme was their calculated decision, as highlighted by notes from a 1995 business meeting, to delay the installation of "Batman the Ride" in order to reduce Respondents' "leverage in negotiating with other potential strategic partners in 1998 and beyond." Pet. App. 10a.[5] Petitioners' starving the park of

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[3] Petitioners' own documents proved that, before buying a controlling interest in December 1991, Petitioners made plans to prevent the Georgia park from making major capital expenditures, while at the same time increasing the level of capital expenditures at Petitioners' wholly owned parks. Pet. App. 8a-9a.

[4] Petitioners imply that they generously "spent vastly more than the required $800,000" out of their own funds (Pet. 4 n.3), but "all capital expenditures" in fact "[came] from the park's [*i.e.*, Respondent Flags'] surplus cash flow." Pet. App. 6a.

[5] Contrary to Petitioners' misrepresentation that this decision stemmed from their fear "that the 1996 Olympics

capital expenditures, such as the Batman ride, depressed the park's value by more than $150 million, inducing consequently weak offers from competing bidders and allowing Petitioners to secure the park at a lower price at the end of 1997. *Id.* at 10a-11a, 8a, 32a-33a. The mechanics of the valuation were relatively straightforward, as "[c]apital investment in an amusement park, especially in major thrill rides, fuels EBITDA[6] growth, which in turn increases the value of the park." *Id.* at 8a. For example, the Batman ride was the most successful capital expenditure in the history of the Six Flags parks and had driven up EBITDA by 37 to 54 percent in the first year after it was installed at Time Warner's wholly owned parks in Chicago, New Jersey, Los Angeles, and St. Louis. *See id.* at 9a; PX 817 at 2; PX 970; PX 484 at 8. The evidence flatly discredits Petitioners' incredulity that appropriate capital expenditures "could logically boost the park's value by $150 million."[7] In any event, the amount of compensatory damages caused by Petitioners' bad acts has not been and cannot be challenged in this Court. Petitioners have paid the compensatory damages award in full.

In addition to depressing the earnings of the Atlanta park, Petitioners actively sabotaged Respondents' attempt to conduct a competitive auction by withholding and distorting financial information necessary to allow

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would draw crowds away from the park" (Pet. 7), the evidence at trial demonstrated that "the Olympics were *never* a factor in [their] decision." Pet. App. 10a (emphasis added).

[6] EBITDA is an acronym for "earnings before interest, taxes, depreciation, and amortization." Pet. App. 8a. Amusement parks are valued, bought, and sold based on a multiple of EBITDA. *Ibid.*

[7] *Compare* Pet. 7 (Petitioners' "incredulity") *with* Pet. App. 8a (Court of Appeals holding "[c]apital investment . . . increases the value of the park."); 10a, 11a, 32a (Court of Appeals discussions of how withheld capital expenditures resulted in the figure for decreased park value awarded by the jury).

other prospective bidders to value the park accurately. Pet. App. 10a-11a; *see also* PX 20 (internal instructions to be "niggardly" in responding to Fund's requests for information and to "flatten out" projections). They also engaged in a variety of other improper acts in violation of the fiduciary duties owed to their partners: they bought land "immediately adjacent" to the park, "thus limiting the park's expansion opportunities" (Pet. App. 5a); they used "confidential business information" from the park to "stud[y] the feasibility of developing a competing park" (*id.* at 6a); they signed employment contracts including non-competition clauses with "key park executives" that would become effective after the partnership ended (*id.* at 7a); and they "deferred" $7 to 10 million of maintenance (*ibid.*). Petitioners' malevolent role in this process (most of which was revealed only by this litigation) belies their idyllic claim that Respondents "voluntarily" entrusted them with management "for another thirty years." Pet. 5.[8]

Petitioners also engaged in other misconduct. For example, they charged more than $4 million of luxury expenses to the partnership in violation of the partnership agreement; they overcharged the partnership by almost $1.4 million for an obsolete minor attraction that was installed instead of the EBITDA-boosting Batman ride; and they contracted with Coca-Cola for a $2.8 million sponsorship fee that was not shared with the partnership and was actually used to finance Petitioners' investment in Six Flags parks (which $2.8 million taken from Respondents reaped a $26.3 million windfall for Petitioners). Pet. App. 11a, 33a.[9]

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[8] Petitioners' scheme worked: The limited partner had no viable alternative to signing a new management contract with Petitioners. Time Warner was the high bidder. Pet. App. at 10a-11a.

[9] Petitioners refer to "unequivocal" proof that the Coca-Cola funds were not used to finance the Six Flags acquisition

In sum, Petitioners were "aware" they owed a fiduciary duty to Respondents "but consciously and intentionally disregarded that duty." Pet. App. 34a.

2. This lawsuit was originally filed by Petitioner Six Flags Theme Parks Inc. (a subsidiary of Time Warner Entertainment) and the general partner, Petitioner Six Flags Over Georgia, Inc. Pet. App. 8a. *Petitioners themselves* chose the forum – a state court in suburban Atlanta. The trial court realigned and added parties. *Ibid.* After a six-week trial, the jury found all four Petitioners liable, awarding $197.3 million in compensatory damages. The jury found by special interrogatory that each Petitioner had acted with "specific intent to harm" and imposed $257 million in punitive damages. *Id.* at 2a & n.3.

After their post-trial motion was denied, Petitioners appealed to the Georgia Court of Appeals. In their briefs in that court, no excerpts of which are included in the appendix to the petition despite Petitioners' obligations under Rule 14.1(g)(i) of this Court, *see infra* p. 11 n.13, Petitioners made only vague challenges to the punitive damages award. Under the heading "The Punitive Damages Are Excessive," Petitioners' "Brief of Appellants" included only two sentences alleging any due process violations. They cited *BMW* only as limiting the amount

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(Pet. 8), but the Court of Appeals affirmed the trial court's exclusion of that alleged proof. Pet. App. 27a. The trial court excluded that alleged proof because Petitioners deliberately concealed it, in violation of court orders, an act which renders the alleged "proof" suspect. Pet. App. 24a-27a. Petitioners' Coca-Cola reference is only one of many instances in which they incant arguments that are totally unsupported by the record. For example, contrary to their assertion that "evidence that the parties' purpose was to create a tax shelter was suppressed" (Pet. 8), Petitioners in fact "presented their own expert testimony covering those points" and cross-examined Respondents' chief witness about them. Pet. App. 23a.

of punitive damages in cases involving "purely economic" harm; they made no reference at all to the "third guidepost" argument that forms the basis for Question 1 of their petition in this Court (reordered Question 2). Resp. App. 16a-17a. As for Question 2 of their petition in this Court (reordered Question 3), at no time did Petitioners assert or even insinuate to the Court of Appeals that the punitive damages award was constitutionally infirm because they lacked notice they could be liable for aiding and abetting breaches of fiduciary duty. Finally, with respect to their Question 3 (reordered Question 1), under the heading "Standard of Review," Petitioners *elected* not to urge that *de novo* review was constitutionally required; instead Petitioners requested the exact "abuse of discretion" standard they now challenge. Petitioners stated that "[t]his Court reviews for *abuse of discretion* rulings . . . for excessive damages." *Id.* at 16a (emphasis added).[10]

3. The Court of Appeals affirmed. Its opinion belies Petitioners' claim that the court restricted its punitive damages analysis "to a single factor: the ratio of punitive to compensatory damages." Pet. 13. Nearly half of the court's opinion set forth and explained the predicates for the first *BMW* guidepost – the reprehensibility of Petitioners' conduct. *See* Pet. App. 1a-13a, 17a-20a, 31a-35a. The Court of Appeals concluded that Petitioners had engaged in "wilful misconduct," delineating instances in which Petitioners "took money belonging to [Respondents]," "kept secret profits derived from the sale of a partnership asset," and "engaged in self-dealing conduct that specifically harmed [Respondents]." *Id.* at 34a, 12a.[11]

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[10] Petitioners' Reply Brief similarly devoted only two sentences to conceivably federal issues. *See* Resp. App. 19a.

[11] It is thus difficult to comprehend Petitioners' declaration that "[a]s for the other claims, petitioners showed that they had not misappropriated anything belonging to the partnership." Pet. 8.

The court also factored into its analysis the extremely low ratio – 1.3 to 1 – of punitive to compensatory damages, but made explicit that it did "not mechanically look to the ratio." *Id.* at 35a.

The Court of Appeals did not explicitly scrutinize the *trial court's* review of the award, as Petitioners made no argument on this point. The court instead confined its review to the issue raised: whether the "*jury's* award was infected by undue prejudice or bias," upholding the verdict because it did not "shock the judicial conscience." Pet. App. 35a (emphasis added).

The Court of Appeals said nothing about *BMW's* third guidepost: Petitioners never asked the court to draw a third guidepost comparison. Pet. App. 35a.

The Court of Appeals rejected Petitioners' objection to the imposition of liability for aiding and abetting a breach of fiduciary duty. The Court of Appeals found that Petitioners had "conceded" the existence of "an aiding and abetting theory of liability" by submitting jury charges on the aiding and abetting theory and by failing properly to enumerate as error on appeal the finding of liability on that ground. Pet. App. 14a, 15a. After considering the substance of Petitioners' argument, the court noted that "[w]ere we required to address this issue," the court would have affirmed. *Id.* at 14a-15a. Under state procedural rules, however, the court concluded that "we lack the jurisdiction to consider it." *Ibid.*

Following the Court of Appeals' affirmance, Petitioners filed a Motion for Reconsideration with the Court of Appeals, in which they conspicuously failed to raise any of the three questions presented in their petition. In reference to the alleged excessiveness of the punitive damages, Petitioners included only a naked citation to *BMW* but offered no discussion of its potential relevance. Resp. App. 21a-22a.

After the Court of Appeals rejected their Motion for Reconsideration, Petitioners sought a discretionary grant

of certiorari from the Georgia Supreme Court. In that petition, Petitioners still elected not to argue that the trial court's analysis should be reviewed *de novo* on appeal. The Georgia Supreme Court rejected the petition, declining to rule on the merits of Petitioners' claims.

REASONS FOR DENYING THE WRIT

I. This Case Does Not Present the Issue of the Appropriate Standard of State Appellate Review of a Trial Court's Due Process Determinations about a Punitive Damages Award

In *Cooper*, this Court carefully explained that it was deciding a different question from the one it resolved in *BMW*. The question in *Cooper* was directed to "the proper standard for reviewing *the District Court's* due process determination," as opposed to "the substantive standard for determining *the jury award's* conformity with due process." *Cooper*, 121 S. Ct. at 1682 n.4 (emphases added). As this Court noted, the second question (review of the jury award itself) had "already been answered" in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). 121 S. Ct. at 1682 n.4.[12] Petitioners cannot elide the distinction between these two questions. The *Cooper* question (appellate review of *the trial court's* due process determinations) was never an issue in this case before it reached this Court. Accordingly, this Court cannot properly use this

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[12] The distinction between the two questions (review of the jury verdict itself and review of the trial court's due process determinations) was further elucidated by the Court's acknowledgment that its rejection of "heightened scrutiny" in *TXO Production Corp. v. Alliance Resources Corp.* – which came in the specific context of "[t]he review of *a jury's* award," 509 U.S. 443, 456 (1993) (emphasis added) – was "irrelevant" to the question of how *the district court's* decision should be reviewed. *Cooper*, 121 S. Ct. at 1682 n.4.

case to decide whether or how to apply its *Cooper* decision to state appellate courts.

A. Petitioners did not present this question to the state court

Petitioners disingenuously claim that they argued for – and that the judgment of the Georgia Court of Appeals constitutes a rejection of – a *de novo* standard for appellate review of a state trial court's due process determination about the punitive damages award. Pet. 10. Contrary to Petitioners' cursory insinuation in violation of this Court's rules,[13] they utterly failed to present this question to the Georgia Court of Appeals. In fact, they requested the abuse of discretion standard they now challenge. Petitioners thus elected not to argue that the Due Process

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[13] Petitioners' entire claim to have presented any of their three questions to the Georgia courts rests on their citation, *without quotation* (Pet. 10), to four pages in their briefs filed in the Georgia Court of Appeals – pages not included in the appendix to their petition filed in this Court – and a parenthetical, conclusory, unsupported claim that "petitioners' briefs filed in [the Georgia Court of Appeals] clearly argued that the punitive damages award violated the due process principles recognized in *BMW*." Pet. 11 n.5. These assertions that federal claims were properly presented, without any supporting quotations, openly flout this Court's express requirement, in Rule 14.1(g)(i), that a petition include "*pertinent quotations* of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . , so as to show that the federal question was timely and properly raised" (emphasis added).

To remedy Petitioners' failure to satisfy Rule 14.1, and to meet their own obligation under Rule 15.2 to "point out . . . any perceived misstatement made in the petition," Respondents are supplying relevant extracts from Petitioners' briefs in the Court of Appeals in the appendix to this brief in opposition. *See* Resp. App., *infra*, at 11a-22a.

Clause requires *de novo* review even though the Eleventh Circuit had already decided, more than five months *before* Petitioners filed their brief in the Court of Appeals, to apply *de novo* review in such circumstances, *see Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1334 (11th Cir. 1999), *cert. denied*, 528 U.S. 931 (1999), thus creating a split with other circuits that already applied an abuse of discretion standard, *see, e.g., Lee v. Edwards*, 101 F.3d 805, 808 (2d Cir. 1996). As a result, no state court in this case addressed or decided the "*Cooper* question." Petitioners' strategic decision now prevents this Court from considering the question in this case, either as a matter of jurisdiction or prudence in light of many " 'practical considerations' relating to this Court's capacity to decide issues." *Adams v. Robertson*, 520 U.S. 83, 90 (1997) (quoting *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79 (1988)).

1. This Court must not review federal issues that were not presented in the state court

This Court's power to review the judgment of the Georgia Court of Appeals must derive from 28 U.S.C. § 1257, but according to the plain language of that statute, this Court has jurisdiction to review a state court's final judgment only *if* "any title, right, privilege, or immunity is *specially set up or claimed* under the Constitution . . . of . . . the United States." 28 U.S.C. § 1257(a) (emphasis added). That requirement was long considered a jurisdictional one, *see, e.g., Webb v. Webb*, 451 U.S. 493, 501-02 (1981); *Cardinale v. Louisiana*, 394 U.S. 437, 438-39 (1969); *Crowell v. Randell*, 35 U.S. (10 Pet.) 368, 392 (1836), and "the Court developed the rule that a [federal] claim would not be considered here unless it had been either raised or squarely considered and resolved in state court." *Illinois v. Gates*, 462 U.S. 213, 218 n.1 (1983) (emphasis omitted). In fact, this Court's own Rules require a petition to specify "when the federal questions

sought to be reviewed were raised . . . so as to show . . . that this Court has *jurisdiction* to review the judgment on a writ of certiorari." S. Ct. R. 14.1(g)(i) (emphasis added).

Although the Court has, in recent years, expressed uncertainty about whether the presentation requirement is actually jurisdictional, it has nevertheless consistently recognized that there is a "weighty presumption against review" of federal claims that were not presented to state courts, *Heath v. Alabama*, 474 U.S. 82, 87 (1985), and it has avoided deciding whether the requirement is still jurisdictional only by continually finding that each individual case presented no reason to depart from the rule. *See, e.g., Adams*, 520 U.S. at 90; *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992); *Bankers Life*, 486 U.S. at 79; *Gates*, 462 U.S. at 222.[14]

Even if the Court were to decide that the presentation rule is not jurisdictional, using its discretion to consider Petitioners' *Cooper* issue in this case would eviscerate the "powerful policy considerations underlying" the rule. *Webb*, 451 U.S. at 499. Chief among those policies is federal-state comity, which "requires that the state courts be afforded the opportunity to perform their duty" to "construe and apply[ ] the applicable federal requirements." *Ibid.*; *see also Adams*, 520 U.S. at 90; *Bankers Life*, 486 U.S. at 79. That justification is amply buttressed by a "constellation of practical considerations." *Bankers Life*, 486 U.S. at 79. The presentation requirement "promot[es] the creation of an adequate factual and legal record"; it clarifies the issues by allowing the parties "to test and refine their positions before reaching this Court"; and it

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[14] As a leading treatise explains, were the Court finally to resolve this question, "it seems better to adhere to the traditional jurisdictional view," lest "difficult questions" about related areas be created. 16B Charles Alan Wright et al., Federal Practice and Procedure § 4022, at 322, 343 (2d ed. 1996).

allows state courts to explain the proper functioning of state rules "as a predicate to [this Court's] assessment of their constitutional adequacy." *Adams*, 520 U.S. at 90-91. This Court benefits when it has a "reasoned opinion on the merits" to review. *Bankers Life*, 486 U.S. at 80. In addition, the presentation requirement ensures that this Court does not decide federal questions unnecessarily by giving the State a chance to implement any of "a number of less intrusive, and possibly more appropriate, resolutions." *Id.* at 79-80.

This Court cannot avoid these considerations by granting certiorari, vacating the judgment, and remanding the case to the Georgia Court of Appeals for further consideration. When § 1257(a) is not satisfied, a grant of certiorari can be followed only by a *dismissal*. *See, e.g., Florida v. Thomas*, 121 S. Ct. 1905, 1910 (2001); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 621 n.1 (1989). A decision to GVR this case would necessarily incorporate a *decision* that the presentation requirement is *not* jurisdictional. And even if the Court were to reach that conclusion (on an issue it has repeatedly left open over a period of eighteen years), a GVR would be inconsistent with the policies that anchor a prudential version of the presentation rule. A GVR would be as harmful to federal-state comity as actually deciding the federal questions that Petitioners raise in their petition. It would scarcely be a sign of respect to order that a state court take up anew a case that it had already resolved according to its settled procedures, so that it might address an issue that the litigants elected not to raise in an orderly and proper fashion – especially when this Court has eschewed that path in the past. In *Bankers Life*, the Court articulated the policy considerations discussed above, but it did not remand to allow the state court to consider imposing some less-intrusive resolution. *See* 486 U.S. at 80, 85 (declining to "address appellant's challenges to the size of the punitive damages award," but affirming judgment

on separate grounds). Indeed, the Court has not remanded any of the cases in which it has declined to decide whether the presentation issue is jurisdictional.[15]

Finally, even if a multitude of other reasons did not make this an inappropriate vehicle for deciding whether the standard of review prescribed in *Cooper* applies to state courts, this Court's interest in the merits of an underlying question does not warrant any departure from the established rule against review. *See Adams*, 520 U.S. at 92 n.6 ("[B]y adhering scrupulously to the customary limitations on our discretion regardless of the significance of the underlying issue, we promote respect for the Court's adjudicatory process." (internal quotation marks and alterations omitted)).

2. Petitioners' *Cooper* claim was not presented to or addressed by the state court

The presentation requirement dictates that a federal issue must have been "pressed" or "passed upon" in state court. *Gates*, 462 U.S. at 219. Neither of those conditions was satisfied in this case.

There can be no doubt that the *Cooper* question was not "passed upon" by the court below. The Georgia Court of Appeals did not consider or resolve any question about what standard of review the *federal* constitution requires *state* appellate courts to apply when reviewing the determinations of trial courts about punitive damages awards. In its opinion, the Court of Appeals noted that Petitioners (as appellants in that court) "argued the punitive damages award was excessive under Georgia law." Pet. App. 35a. Citing only a state case, the Court of Appeals

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[15] *See Adams*, 520 U.S. at 92 (dismissing writ of certiorari as improvidently granted); *Yee*, 503 U.S. at 533, 539 (declining to address non-presented issue, affirming on separate grounds); *Gates*, 462 U.S. at 224, 246 (declining to address non-presented issue, reversing on separate grounds).

explained that "[a]n award of punitive damages will not be disturbed on appeal unless it is so excessive or inadequate as to shock the judicial conscience to the degree that a judgment entered thereon constitutes an error of law." *Ibid.* (internal quotation marks omitted). There was no other reference to the standard of review for punitive damages in the court's opinion. The rest of the paragraph, however, made clear that the Court of Appeals was not addressing the *Cooper* question. Rather than scrutinize the trial court's determinations, it expressly evaluated "whether *the jury's award* was infected by undue prejudice or bias," and concluded that the jury's award was not excessive. *Ibid.* (emphasis added). Because the Court of Appeals gave no indication that it considered its standard of review of the trial court's determinations about punitive damages to be dictated by federal constitutional concerns, it cannot be found to have "passed upon" the issue. *Cf. Webb*, 451 U.S. at 495 ("[N]owhere in the opinion of the Georgia Supreme Court is any federal question mentioned, let alone expressly passed upon.").

"This Court has frequently stated that when 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.' " *Ibid.* (quoting *Street v. New York*, 394 U.S. 576, 582 (1969)). Petitioners cannot meet that burden here for the simple reason that they did not present the *Cooper* question in the state court. Indeed, their briefs filed in the Court of Appeals give no hint that the appellate standard for reviewing the trial court's due process determinations in punitive damage cases is a federal constitutional concern. Instead, in their opening brief to the Court of Appeals, Petitioners alleged that "[t]he trial court erred by failing to strike or reduce Plaintiffs' punitive damages as excessive" (Resp. App. 15a), but, under the heading "Standard of Review," Petitioners then told the appellate

court: "This Court reviews for *abuse of discretion* rulings . . . for excessive damages, *Lisle v. Willis*, 265 Ga. 861, 864, 463 S.E.2d 108, 110 (1995)." Resp. App. 16a (emphasis added).[16] Petitioners did not further discuss the standard of review in their briefs to the Court of Appeals.

Petitioners vainly attempt to shoehorn the discrete *Cooper* question into their general reference to "due process principles recognized in *BMW*." Pet. 11 n.5. It is, however, well established that a petitioner must have raised "the claim of invalidity *and the ground therefor . . . with fair precision* and in due time." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928) (emphasis added). "A general statement that the decision of a court is against the constitutional rights of the objecting party

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[16] Petitioners' citation of *Lisle*, a state-law case, for the standard of review could scarcely indicate that they considered the proper standard for reviewing a trial court's punitive-damages rulings to be a matter of *federal* constitutional concern.

In their reply brief in support of their Application for Stay in this Court, Petitioners claimed that they cited *Lisle* only with respect to the denial of their motion for a new trial. *See* Applicants' Reply to Respondents' Response to Application for Stay at 5 n.5, No. A-725 (filed Feb. 28, 2001) (hereinafter "Stay Reply"). But that motion is precisely how Petitioners raised their punitive damages challenge. They cited *Lisle* to the trial court for the proposition that it "must *set aside or reduce* the [punitive damages] award." Amended Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for New Trial at 76 (filed Feb. 1, 1999). This was in fact the required procedure under O.C.G.A. § 51-12-12(b) (Resp. App. 9a), which provides that the remedy for an excessive verdict must be either a new trial, a new trial on damages, or a conditional new trial if the plaintiff refuses a remittitur. *See Spence v. Hilliard*, 389 S.E.2d 753, 754 (Ga. 1990) ("Under the plain language of the statute a judge has three alternatives when a jury makes an award of damages that is clearly inadequate or excessive.").

or against the Fourteenth Amendment, or that it is without due process of law, . . . will not raise a Federal question. . . . " *Clarke v. McDade*, 165 U.S. 168, 172 (1897); *see also Beck v. Washington*, 369 U.S. 541, 553 (1962) (single sentence in 125-page state-court brief did not preserve question for this Court's review).

Petitioners' citation of *BMW*, without referring to the standard of appellate review (*see* Resp. App. 17a), did not remotely present the *Cooper* question. *See Adams*, 520 U.S. at 88 (citation to case that "is relevant to the federal claim" is inadequate if case is "mentioned . . . in the context of an entirely different argument"). That is particularly true when this Court has explicitly acknowledged that *Cooper* resolved a separate question from the one addressed in *BMW*. *See* 121 S. Ct. at 1682 n.4. Nor could the proper presentation of *some* due process claims under *BMW* adequately preserve separate ones; this Court will not review "any federal question not shown by the record to have been raised in the state court or considered there, whether it be one arising under a different *or the same clause* in the Constitution with respect to which other questions are properly presented." *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 317 (1937) (emphasis added). Any other conclusion would impose on state courts the obligation to embark, at the slightest suggestion of some limited impropriety, upon *sua sponte* missions to search out, analyze, and dispose of every variant of a potential federal argument without guidance from the parties. To impose such a duty would eviscerate the "important interest of comity" that underlies the presentation requirement. *Adams*, 520 U.S. at 90.

In their reply brief filed in support of their Application for Stay in this Court, Petitioners attempted to avoid the necessary consequences of their plain failure to raise the *Cooper* question in the Court of Appeals by claiming that they raised it at the "earliest next opportunity." Stay Reply at 5. But they did not, in fact, refer to standards of

appellate review in the Motion for Reconsideration they filed with the Court of Appeals. *See* Resp. App. 21a-22a. Even when they subsequently filed their certiorari petition with the Georgia Supreme Court, they did not say anything about whether the trial court's determination about punitive damages should be reviewed *de novo*; nor did they suggest to the Georgia Supreme Court that this was a federal or constitutional issue.[17]

Nevertheless, whatever Petitioners said *after* they lost in the Court of Appeals came too late to matter for presentation purposes. *See Yee*, 503 U.S. at 533 (federal claim was not properly raised when mentioned for the first time in petition for discretionary review by state supreme court); *see also Herndon v. Georgia*, 295 U.S. 441, 443 (1935) (referring to "[t]he long-established general rule . . . that the attempt to raise a federal question after judgment, on a petition for rehearing, comes too late").

In their reply brief filed in support of their Application for Stay in this Court, Petitioners also attempted to analogize their presentation of the standard-of-review question to the presentation made by the petitioner in *Cooper*. *See* Stay Reply at 5. Such a comparison is, of course, fundamentally flawed, because *Cooper* involved an appeal from a federal court. Presentation concerns are much more significant when the lower court is a state court. *See United States v. Williams*, 504 U.S. 36, 44 n.5 (1992); *id.* at 59 n.6 (dissenting opinion of Stevens, J., joined by Blackmun and O'Connor, JJ.). Moreover, the petitioner in *Cooper*, unlike Petitioners here, actually requested that the Court of Appeals apply a *de novo*

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[17] In their opposition to Petitioners' stay application in this Court, Respondents mistakenly said Petitioners had raised the *Cooper* question in their certiorari petition filed in the Georgia Supreme Court. In fact, even at that point, they raised only a *BMW* question of how jury awards themselves should be reviewed. *See supra* pp. 10-11 & n.12; *Cooper*, 121 S. Ct. at 1682 n.4.

standard of review. *See* Pet.'s Reply to Brief in Opp., *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, No. 99-2035 at 1 (filed Aug. 17, 2000).

Petitioners' invocation of this Court's recent order in *San Paolo U.S. Holding Co. v. Simon*, 121 S. Ct. 2190 (2001) (mem.), overlooks the presentation issue altogether. Although the Court GVRd that case in light of *Cooper*, the petitioner in *San Paolo* did precisely the opposite of what Petitioners here did: The *San Paolo* petitioner clearly requested *de novo* review in the state court. *See* Resp. App. 24a (state court of appeal brief arguing that "the determination of the constitutionality of a punitive damage award under the due process clause is reviewed on a *de novo* basis").[18] Accordingly, there was no jurisdictional bar to a GVR in *San Paolo*, and the procedure followed there is inapposite to this case.

It is simply too late for Petitioners to inject a *Cooper* question into this case.

B. Petitioners waived this claim by failing to appeal directly to the Georgia Supreme Court

Petitioners' *Cooper* claim is independently barred by an element of judicial procedure imposed by the Georgia Constitution. Georgia has a bifurcated appeals process that requires an appellant to choose whether to appeal to the Georgia Supreme Court or the Georgia Court of Appeals. The jurisdiction of the two courts is mutually

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[18] Petitioners refer to the "substantial evidence" standard applied by the state court in *San Paolo*. Pet. 24 n.19. In fact, unlike Petitioners here, the petitioner in *San Paolo* clearly distinguished for the state court between (1) the *de novo* standard that should apply to "the determination of the constitutionality of a punitive damage award" and (2) the "substantial evidence" standard that should apply to the general question of excessiveness, which it described as its challenge to "the amount of punitive damages awarded." Resp. App. 24a.

exclusive. The Georgia Supreme Court has "exclusive appellate jurisdiction in . . . [a]ll cases involving the construction of . . . the Constitution . . . of the United States and all cases in which the constitutionality of a law, ordinance, or constitutional provision has been drawn into question." GA. CONST. art. VI, § 6, ¶ 2(1) (Resp. App. 2a-3a). The Court of Appeals, on the other hand, "shall exercise appellate and certiorari jurisdiction in all cases not reserved to the Supreme Court or conferred on other courts by law." *Id.* art. VI, § 5, ¶ 3 (Resp. App. 2a).

By statute and precedent it is clear under Georgia law that a verdict's excessiveness is a question of fact that is reviewed *only* for an abuse of discretion. *See* O.C.G.A. § 51-12-12(a) (Resp. App. 9a); *see also Seaboard Coast Line R.R. v. Towns*, 274 S.E.2d 74, 77-78 (Ga. App. 1980) (applying same statute in prior codification; "An excessive or inadequate verdict constitutes a mistake of fact rather than of law. . . . [T]his court's jurisdiction is confined to the question of whether the trial court abused [her] discretion in overruling the motion for a new trial on this ground." (internal quotation marks omitted)); *Atlanta Transit Sys., Inc. v. Robinson*, 213 S.E.2d 547, 549 (Ga. App. 1975) (same).[19] Any constitutional challenge to that standard of review needed to be directed to the Georgia Supreme Court.[20]

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[19] This is the same statute Petitioners cited in asking the Court of Appeals to set aside or reduce the punitive damages. *See* Resp. App. 16a, 21a-22a.

[20] In their reply brief filed in support of their Application for Stay in this Court (Stay Reply at 4), Petitioners invoked *General Motors Corp. v. Moseley*, 447 S.E.2d 302 (Ga. App. 1994). Although *Moseley* establishes that the Court of Appeals may apply settled constitutional principles to factual circumstances, that conclusion is irrelevant to the circumstances of this case, where Petitioners' *Cooper* question would require a determination that the U.S. Constitution

Petitioners, however, elected to appeal to the Court of Appeals, and certified that "the constitutionality of a law . . . has not been drawn into question." Resp. App. 13a. Therefore, Petitioners affirmatively represented to the Georgia Court of Appeals that this case did not involve a constitutional challenge to Georgia's established procedure and statute for reviewing the excessiveness of punitive damage awards under an abuse of discretion standard.

This Court has previously held that precisely such a process in Illinois state courts resulted in a binding waiver that deprived this Court of jurisdiction to address federal constitutional issues. *See Central Union Tel. Co. v. City of Edwardsville*, 269 U.S. 190, 196 (1925) (State law "required the appeal on constitutional grounds to be taken directly . . . to the Supreme Court of Illinois. [Petitioner] elected, instead, to go to the Appellate Court . . . , and thereby it waived the question which it now wishes to present here.").

Under these circumstances, even a GVR would pose a particularly strong threat to comity and rational judicial process. By remanding to the Georgia Court of Appeals, this Court would be ordering that court to consider whether to declare Georgia's established procedure unconstitutional, an issue which, under state law, it has no power to decide.

C. Petitioners requested the standard of review they now challenge

Petitioners' own brief requested that "excessive damages" be reviewed for "abuse of discretion." Resp. App. 16a. Petitioners never said that excessiveness is a question of law (which would have been inaccurate under

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invalidated Georgia's well-established statute and caselaw mandating abuse-of-discretion review.

established Georgia law, *see supra* pp. 21-22) or that any excessiveness question should be reviewed *de novo* on appeal. Moreover, they cited cases such as *Lisle* and *Ford Motor Co. v. Stubblefield*, 319 S.E.2d 470 (Ga. App. 1984), which established that the trial court's decision on the question of excessiveness was appropriately reviewed for an abuse of discretion. *See* Resp. App. 16a; *see also supra* p. 17 n.16 (discussing *Lisle*); *Stubblefield*, 319 S.E.2d at 481.

Taken alone, Petitioners' request for an abuse of discretion standard constitutes an independent ground for this Court to deny certiorari. *See, e.g., International Precious Metals Corp. v. Waters*, 530 U.S. 1223, 1224 (2000) (statement of Justice O'Connor respecting denial of petition for a writ of certiorari) (certiorari is properly denied where petitioner took inconsistent position below).[21]

II. The State Court of Appeals Did Not Improperly Disregard the Third *BMW* Guidepost

Attempting to shift attention from the incurable presentation problems besetting their *Cooper* question, Petitioners now relegate it to the end of their petition and elevate to Question 1 an old chestnut: whether courts can disregard *BMW*'s third guidepost, which refers to "the civil or criminal penalties that could be imposed for comparable misconduct." *BMW*, 517 U.S. at 583. Petitioners explain that several courts have found a comparison between a punitive damages award and other penalties to be irrelevant or inapplicable when there is no directly analogous civil or criminal penalty. The state

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[21] In addition, Petitioners' request for abuse of discretion review barred them under Georgia law from later claiming that use of that standard was error. "[O]ne cannot complain of an appellate ruling, order, or judgment that his own legal strategy, appellate procedure or conduct aided in causing." *Williams v. Food Lion, Inc.*, 446 S.E.2d 221, 225 (Ga. App. 1994).

court in this case, however, made no such finding, because it was never even asked to address this question.

The trends in state court application of the third guidepost that Petitioners articulate are not new. *See* Pet. 14 n.7. This Court has frequently denied certiorari in cases raising this precise issue, and it has even done so in cases in which lower courts have affirmatively decided not to apply the third guidepost.[22] Taken alone, those factors strongly indicate that this issue may not be cert-worthy at all. In this case, however, it is even less cert-worthy, because the Court of Appeals has not even taken a side in whatever conflict there may be. Furthermore, certiorari is made even less appropriate by the specific facts of this case, which demonstrate that the award was not excessive under *BMW*.

A. The applicability of the third guidepost was not presented to or addressed by the state court

Petitioners' general references to due process (*see supra* pp. 7-10) were inadequate to raise a "third guidepost" issue, *see Clarke v. McDade*, 165 U.S. at 172, and their naked references to *BMW* were certainly not sufficient to raise a legal claim about a topic on which they now contend there are two established lines of authority. *See Adams*, 520 U.S. at 88.

Nor was this issue addressed by the state court. There was no mention whatsoever of the third guidepost in the Court of Appeals opinion. It is therefore clear that the Court of Appeals did not "squarely consider[ ] and

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[22] In a case cited by Petitioners, for example, the petition presented the third-guidepost question, describing both "a trend in some jurisdictions to evade this *BMW* guidepost" and the existence of "directly conflicting decisions over application of this guidepost" (Pet. for Cert., *Ford Motor Co. v. Ammerman*, No. 99-1221 at i, 21, 22 (filed Jan. 19, 2000)), but this Court denied certiorari, *see* 529 U.S. 1021 (2000).

resolve[ ]" whether *BMW*'s third guidepost applies in cases like this, and review by this Court of that issue is accordingly inappropriate. *Gates*, 462 U.S. at 218 n.1.

B. The punitive damages award was not excessive under *BMW*

Even if jurisdiction existed over this question, the merits of this case present only a fact-bound application of settled law that would be of no interest to this Court in the exercise of its discretionary jurisdiction. Moreover, that application of settled law shows that the punitive damages award is not excessive under *BMW*.

Under the first *BMW* guidepost, Petitioners' conduct was highly reprehensible, involving a long-term scheme characterized by "wilful misconduct" in clear violation of their fiduciary obligations. Pet. App. 34a. Not surprisingly, courts around the country have repeatedly found that breaches of fiduciary duty between partners can warrant punitive damages.[23]

Under the second *BMW* guidepost, the ratio of punitive to compensatory damages in this case is only 1.3 to 1. There is no "simple mathematical formula" to mark excessiveness, *BMW*, 517 U.S. at 582, but even Petitioners recognize that this ratio provides no ground for attack.

Under the third *BMW* guidepost, Petitioners' only attempt, even in this Court, to analyze comparable penalties is to compare the award to federal criminal antitrust fines levied in FY 1997. *See* Pet. 15. Petitioners presumably believe that antitrust law penalizes "comparable misconduct" because it deals with financial injuries inflicted by businesses. But the statutory availability of *treble damages* for federal antitrust violations (*see* 15 U.S.C. § 15(a))

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[23] *See, e.g., Clark v. Lubritz*, 944 P.2d 861, 866-67 (Nev. 1997) (citing cases). Punitive damages have long been available in Georgia for the tort of breaching a fiduciary duty. *See, e.g., Pelletier v. Schultz*, 276 S.E.2d 118, 120 (Ga. App. 1981).

demonstrates the reasonableness of the total award in this case, which is significantly lower than treble damages would have been. Moreover, Petitioners' antitrust statistic is meaningless. It excludes all *civil* antitrust liability, even though "[t]he heart of antitrust continues to be private litigation,"[24] and civil antitrust liability dwarfs criminal liability.

Apart from Petitioners' antitrust example, there are other penalties for comparable misconduct that demonstrate the reasonableness of this punitive damages award. The Court of Appeals found that Petitioners "took money belonging to [Respondents]." Pet. App. 34a. This is plainly comparable to theft.[25] In Georgia, "[t]heft by taking in breach of a fiduciary obligation is a felony offense." *Hanson v. Georgia*, 501 S.E.2d 865, 868 (Ga. 1998); *see* O.C.G.A. § 16-8-2, -3 (Resp. App. 3a-4a). As such, it is a serious crime, punishable by a 15-year prison term. *See* O.C.G.A. § 16-8-12(a)(2) (Resp. App. 4a-5a). In addition, if the prison term is suspended or probated, a criminal defendant can be ordered to make restitution to the victim up to the amount that would be recoverable as damages in a civil action. *See* O.C.G.A. § 17-14-3, -9 (Resp. App. 8a-9a).

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[24] *See* Stephen Calkins, *Corporate Compliance and the Antitrust Agencies' Bi-Modal Penalties*, 60 LAW & CONTEMP. PROBS. 127, 154-55 (1997).

[25] Indeed, Respondents sued Petitioners for both conversion and breach of fiduciary duty to recover the monies taken in breach of trust. In closing argument, however, Respondents' counsel expressly asked the jury to choose only one basis for liability so as to avoid a double recovery. *See* Tr. Transcript (12/17/98) at 187-88 ("You can return a verdict based on breach of fiduciary duty *or* conversion. It's both. . . . but *don't return the verdict twice.*" (emphases added)). The jury accordingly awarded the taken monies under the breach of fiduciary duty claim and found for Petitioners on conversion. Pet. App. 2a & n.2, 33a, 34a.

Moreover, Petitioners committed more than two acts of theft against both Flags and Fund, meaning that their conduct could fall under Georgia's RICO statute. *See* O.C.G.A. §§ 16-14-1 *et seq.* Accordingly, such conduct could trigger a prison term of up to 20 years and/or a fine as large as *three times* their pecuniary gain. *See* O.C.G.A. § 16-14-5 (Resp. App. 7a). The civil penalty for a RICO violation includes treble damages, to which punitive damages can also be added. *See* O.C.G.A. § 16-14-6(c) (Resp. App. 8a).

III. Petitioners Failed to Present Any Notice-Based Due Process Challenge to Punitive Damages for Aiding and Abetting Breaches of Fiduciary Duty, Waived Any Challenge to Liability on That Basis, and Had Full Notice That Such Conduct Was Illegal

A. Petitioners' notice concerns were not presented to or addressed by the state court and are independently barred by waiver

As set forth fully above (*see supra* pp. 7-10), Petitioners made only the briefest mention of due process in their briefs in the Court of Appeals, and their argument and their citation to *BMW* were limited exclusively to the point that this case involves economic damages rather than threats to health and safety. Resp. App. 17a, 19a. This was clearly inadequate to constitute the proper presentation of any federal constitutional concerns they might have had about notice. *See supra* pp. 17-19. That insufficiency alone should preclude this Court from granting certiorari, either as a matter of jurisdiction or of prudential regard for the policies underlying the presentation doctrine.

In addition, Petitioners' notice claim is independently barred by their waiver at trial of any objection to aiding-and-abetting liability. As the Court of Appeals

concluded, Petitioners waived this issue under state procedural requirements in two separate ways: by failing to object at trial to aiding-and-abetting liability (and in fact submitting their own charges on that theory), and by failing to "enumerate[ ] as error the jury's finding of liability on this theory." Pet. App. 14a, 15a. Thus, under established state procedural law, the Court of Appeals *had no jurisdiction* to consider Petitioners' belated objections to aiding-and-abetting liability. *Ibid.* This constitutes an adequate and independent state law ground that prevents this Court from considering any federal law questions attendant to aiding-and-abetting liability. *See Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978).

B. Petitioners had full notice of their potential liability for aiding and abetting

Petitioners' claim that they lacked notice of their potential liability cannot be taken seriously. It is difficult to fathom how Petitioners can claim to have been surprised when held liable based on a legal theory for which they, themselves, submitted a jury charge. Pet. App. 14a, 15a.

Petitioners' lack of notice argument rests on their interpretation of the partnership agreement and on their contention that there can be no liability for aiding and abetting a breach of fiduciary duty. Pet. 17. The Court of Appeals, however, rejected both of those predicates as a matter of state law.

As to the partnership agreement, the Court of Appeals found as a matter of law that Petitioners had a duty to act "in good faith as to the amount and type of capital improvements." Pet. App. 16a. Even more compellingly, it found *as a matter of fact* that Petitioners themselves had "never interpreted the capital expenditures provision" to mean what they now claim it meant. *Id.* at 19a.

In dicta, the Court of Appeals rejected the linchpin of Petitioners' notice claim – that aiding-and-abetting liability was a "novel tort." The court noted that such claims had "at least twice" been acknowledged as viable in prior Georgia cases and that such liability was "implicit in OCGA § 51-12-30 [Resp. App. 9a-10a], pertaining to the joint liability of one who procures an actionable wrong." Pet. App. 13a-14a.[26] Moreover, such liability has long been clear under the Restatement of Torts. *See* RESTATEMENT (SECOND) OF TORTS § 874 cmt. c (1979) ("A person who knowingly assists a fiduciary in committing a breach of trust is himself guilty of tortious conduct and is subject to liability for the harm thereby caused.").

Petitioners try to concoct a conflict by relying on *Banks v. ICI Americas, Inc.*, 469 S.E.2d 171 (Ga. 1996), in which the Georgia Supreme Court held that the federal Constitution does not prevent the imposition of punitive damages for the violation of a "new" *product-liability* rule. *See* Pet. 20. *Banks* is, however, utterly unrelated to this case and the judgment Petitioners seek to have reviewed. Neither the parties nor the Court of Appeals cited *Banks* for anything. Thus, Petitioners essentially ask this Court to intervene so that it could reject *Banks* on the ground that, *if* the state court had not held as a matter of state law that Petitioners waived their challenge to aiding-and-abetting liability (Pet. App. 14a), and *if* the state court had not noted in the alternative that such liability existed under pre-existing Georgia law and that the evidence supported a finding of aiding-and-abetting liability (*id.* at 14a, 15a), then the state court *might have* proceeded to rely

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[26] In addition to the cases cited by the Court of Appeals, see also *Loyola Federal Savings Bank v. Fickling*, 58 F.3d 603, 605, 608 (11th Cir. 1995) (upholding $215,000 jury verdict on claim against bank under Georgia law for "assist[ing]" a "general partner in a breach of a fiduciary duty owed to" a limited partner).

on *Banks* in this case to reject Petitioners' due process claim (had they actually articulated that claim). This Court does not employ its certiorari jurisdiction to pursue such will-o'-the-wisps.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES E. BUTLER, JR.
GEORGE W. FRYHOFER III
BUTLER, WOOTEN, SCHERFFIUS, FRYHOFER, DAUGHTERY & SULLIVAN
2719 Buford Highway
Atlanta, Georgia 30324
(404) 321-1700

GERALD DAVIDSON, JR.
ANDERSEN, DAVIDSON & TATE
P.O. Box 2000
Lawrenceville, Georgia 30246
(770) 822-0900

EMMET J. BONDURANT II
Counsel of Record
H. LAMAR MIXSON
MICHAEL B. TERRY
JOSHUA F. THORPE
BONDURANT, MIXSON & ELMORE, LLP
3900 One Atlantic Center
1201 W. Peachtree St., NW
Atlanta, Georgia 30309
(404) 881-4100

Counsel for Respondents

August 14, 2001

RESPONDENTS' APPENDIX

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE
Title 28 – Judiciary and Judicial Procedure
Part IV – Jurisdiction and Venue
Chapter 81 – Supreme Court

* * *

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

CONSTITUTION OF THE STATE OF GEORGIA
Article VI – Judicial Branch

* * *

Section 5 – Court of Appeals

* * *

Paragraph 3. Jurisdiction of Court of Appeals; decisions binding.

The Court of Appeals shall be a court of review and shall exercise appellate and certiorari jurisdiction in all cases not reserved to the Supreme Court or conferred on other courts by law. The decisions of the Court of Appeals insofar as not in conflict with those of the Supreme Court shall bind all courts except the Supreme Court as precedents.

* * *

Section 6 – Supreme Court

* * *

Paragraph 2. Exclusive appellate jurisdiction of Supreme Court.

The Supreme Court shall be a court of review and shall exercise exclusive appellate jurisdiction in the following cases:

> (1) All cases involving the construction of a treaty or of the Constitution of the State of Georgia or of the United States and all cases in which the constitutionality of a law, ordinance,

or constitutional provision has been drawn in question;

* * *

OFFICIAL CODE OF GEORGIA

* * *

§ 16-8-2. Theft by taking

A person commits the offense of theft by taking when he unlawfully takes or, being in lawful possession thereof, unlawfully appropriates any property of another with the intention of depriving him of the property, regardless of the manner in which the property is taken or appropriated.

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§ 16-8-3. Theft by deception

(a) A person commits the offense of theft by deception when he obtains property by any deceitful means or artful practice with the intention of depriving the owner of the property.

(b) A person deceives if he intentionally:

(1) Creates or confirms another's impression of an existing fact or past event which is false and which the accused knows or believes to be false;

(2) Fails to correct a false impression of an existing fact or past event which he has previously created or confirmed;

(3) Prevents another from acquiring information pertinent to the disposition of the property involved;

(4) Sells or otherwise transfers or encumbers property intentionally failing to disclose a substantial and valid known lien, adverse claim, or other legal impediment to the enjoyment of the property, whether such impediment is or is not a matter of official record; or

(5) Promises performance of services which he does not intend to perform or knows will not be performed. Evidence of failure to perform standing alone shall not be sufficient to authorize a conviction under this subsection.

(c) "Deceitful means" and "artful practice" do not, however, include falsity as to matters having no pecuniary significance, or exaggeration by statements unlikely to deceive ordinary persons in the group addressed.

* * *

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§ 16-8-12. Penalties for violation of Code Sections 16-8-2 through 16-8-9 [involving theft]

(a) A person convicted of a violation of Code Sections 16-8-2 through 16-8-9 shall be punished as for a misdemeanor except:

* * *

(2) If the property was taken by a fiduciary in breach of a fiduciary obligation . . . , by imprisonment for not less than one nor more than 15 years, a fine not to exceed the amount provided by Code Section 17-10-8, or both;

* * *

---

§ 16-14-3. Definitions

As used in this chapter, the term:

* * *

(6) "Enterprise" means any person, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity; or any unchartered union, association, or group of individuals associated in fact although not a legal entity; and it includes illicit as well as licit enterprises and governmental as well as other entities.

* * *

(8) "Pattern of racketeering activity" means engaging in at least two incidents of racketeering activity that have the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such incidents occurred after July 1, 1980, and that the last of such incidents occurred within four years, excluding any

periods of imprisonment, after the commission of a prior incident of racketeering activity.

(9)(A) "Racketeering activity" means to commit, to attempt to commit, or to solicit, coerce, or intimidate another person to commit any crime which is chargeable by indictment under the following laws of this state:

* * *

(ix) Article 1 of Chapter 8 of this title, relating to theft;

* * *

(B) "Racketeering activity" shall also mean any act or threat involving . . . theft . . . which is chargeable under the laws of the United States or any of the several states and which is punishable by imprisonment for more than one year.

* * *

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§ 16-14-4. Prohibited activities

(a) It is unlawful for any person, through a pattern of racketeering activity or proceeds derived therefrom, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money.

(b) It is unlawful for any person employed by or associated with any enterprise to conduct or participate in, directly or indirectly, such enterprise through a pattern of racketeering activity.

* * *

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§ 16-14-5. Criminal penalties for violation of Code Section 16-14-4

(a) Any person convicted of the offense of engaging in activity in violation of Code Section 16-14-4 is guilty of a felony and shall be punished by not less than five nor more than 20 years' imprisonment or the fine specified in subsection (b) of this Code section, or both.

(b) In lieu of any fine otherwise authorized by law, any person convicted of the offense of engaging in conduct in violation of Code Section 16-14-4 may be sentenced to pay a fine that does not exceed the greater of $25,000.00 or three times the amount of any pecuniary value gained by him from such violation.

* * *

(d) For the purposes of subsection (b) of this Code section, "pecuniary value" means:

(1) Anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else, the primary significance of which is economic advantage; or

(2) Any other property or service that has a value in excess of $100.00.

* * *

---

§ 16-14-6. Available civil remedies

* * *

(c) Any person who is injured by reason of any violation of Code Section 16-14-4 shall have a cause of action for three times the actual damages sustained and, where appropriate, punitive damages. Such person shall also recover attorneys' fees in the trial and appellate courts and costs of investigation and litigation reasonably incurred. The defendant or any injured person may demand a trial by jury in any civil action brought pursuant to this Code section.

* * *

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§ 17-14-3. Requirement of restitution by adult offender as condition of relief generally

The judge of any court of competent jurisdiction may order that an adult offender make restitution as a condition of any relief ordered by the court. The board may order that an adult offender make restitution as a condition of any relief ordered by the board. The department may order that an adult offender make restitution as a condition of any relief ordered by the department.

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§ 17-14-9. Amount of restitution

The amount of restitution ordered may be equal to or less than, but not more than, the victim's damages.

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§ 51-12-12. Court interference with jury verdict as to damages

(a) The question of damages is ordinarily one for the jury; and the court should not interfere with the jury's verdict unless the damages awarded by the jury are clearly so inadequate or so excessive as to be inconsistent with the preponderance of the evidence in the case.

(b) If the jury's award of damages is clearly so inadequate or so excessive as to any party as to be inconsistent with the preponderance of the evidence, the trial court may order a new trial as to damages only, as to any or all parties, or may condition the grant of such a new trial upon any party's refusal to accept an amount determined by the trial court.

* * *

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§ 51-12-30. Procurer of wrong as joint wrongdoer; how action brought against joint wrongdoer

In all cases, a person who maliciously procures an injury to be done to another, whether an actionable wrong or a breach of contract, is a joint wrongdoer and

may be subject to an action either alone or jointly with the person who actually committed the injury.

APPENDIX B

IN THE COURT OF APPEALS

STATE OF GEORGIA

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
SIX FLAGS ENTERTAINMENT CORPORATION,
SIX FLAGS THEME PARKS INC., and
SIX FLAGS OVER GEORGIA, INC.,

Appellants/Defendants,

-against-

SIX FLAGS OVER GEORGIA, LLC, SIX FLAGS FUND, LTD. (L.P.), and GEORGE DEROY, as Trustee of the Six Flags Claims Trust,

Appellees/Plaintiffs.

Appeal No. A00A0120

APPELLANTS' ENUMERATION OF ERRORS

[September 20, 1999]

Walt M. Britt
Georgia Bar No. 083237
Chandler & Britt, LLC
4350 South Lee Street
Buford, GA 30518
(770) 271-2991

Evan R. Chesler
Keith R. Hummel
Cravath, Swaine & Moore
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
(212) 474-1000

Attorneys for Appellants
Time Warner Entertainment
Company, L.P., Six Flags
Entertainment Corporation, Six Flags
Theme Parks Inc., and Six Flags
Over Georgia, Inc.

* * *

[Page 2]

12. The trial court erred by failing to grant Defendants judgment on liability for punitive damages.

13. The trial court erred by failing to instruct the jury on the standard of proof for specific intent to harm.

[Page 3]

14. The trial court erred by failing to strike or reduce Plaintiffs' punitive damages as excessive.

Statement of Jurisdiction

This Court has appellate jurisdiction over this appeal under Article VI, Section 5, Paragraph 3 of the Georgia Constitution because this is not a case reserved to the Supreme Court or conferred on another court by law. This case is not reserved to the Supreme Court under Article VI, Section 6, Paragraph 3 of the Georgia Constitution.

This appeal is not within the exclusive appellate jurisdiction of the Supreme Court under Article VI, Section 6, Paragraph 2 of the Georgia Constitution because it does not involve construction of a doubtful constitutional provision or construction of a treaty, and

the constitutionality of a law, ordinance or constitutional provision has not been drawn into question.

* * *

APPENDIX C

IN THE COURT OF APPEALS

STATE OF GEORGIA

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
SIX FLAGS ENTERTAINMENT CORPORATION,
SIX FLAGS THEME PARKS INC., and
SIX FLAGS OVER GEORGIA, INC.,

Appellants/Defendants,

-against-

SIX FLAGS OVER GEORGIA, LLC, SIX FLAGS FUND, LTD. (L.P.), and GEORGE DEROY, as Trustee of the Six Flags Claims Trust,

Appellees/Plaintiffs.

Appeal No. A00A0120

BRIEF OF APPELLANTS

[September 20, 1999]

Walt M. Britt
Georgia Bar No. 083237
Chandler & Britt, LLC
4350 South Lee Street
Buford, GA 30518
(770) 271-2991

Evan R. Chesler
Keith R. Hummel
Cravath, Swaine & Moore
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
(212) 474-1000

Attorneys for Appellants
Time Warner Entertainment
Company, L.P., Six Flags
Entertainment Corporation, Six Flags
Theme Parks Inc., and Six Flags
Over Georgia, Inc.

* * *

[Page 15, Summary of Argument]

Seventh, the court erred by not setting aside the $257,000,000 punitive damages award. The evidence here, involving a purely commercial dispute, fell far short of that required to impose such damages. (*See* enumeration of error 12.) Moreover, all punitive damages above $250,000 must be remitted because the court failed to instruct the jury on the clear-and-convincing burden of proof on the special finding of specific intent to harm. (*See* enumeration of error 13.) And lastly, the unprecedented amount awarded is excessive under both statutory and constitutional standards. (*See* enumeration of error 14.)

* * *

[Page 17, Enumeration of Errors]

12. The trial court erred by failing to grant Defendants judgment on liability for punitive damages.

13. The trial court erred by failing to instruct the jury on the standard of proof for specific intent to harm.

14. The trial court erred by failing to strike or reduce Plaintiffs' punitive damages as excessive.

PART THREE

Standard of Review

This Court reviews *de novo* rulings on questions of law. *Bumgarner v. Green*, 177 Ga. App. 156, 158-60, 489 S.E.2d 43, 46-47 (1997). Improper jury charges and comments on witness credibility require a new trial if harmful. *Bennett v. Bagwell & Stewart, Inc.*, 216 Ga. 290, 297-98, 116 S.E.2d 288, 293 (1960); *Speagle v. Nationwide Mut. Fire Ins. Co.*, 138 Ga. App. 384, 385, 226 S.E.2d 459, 460 (1976). Denial of directed verdict and JNOV motions must be reversed if the evidence does not support the verdict. *Tate v. Holloway*, 231 Ga. App. 831, 833, 499 S.E.2d 72, 74 (1998). This Court reviews for abuse of discretion rulings to admit or exclude evidence, *Andrews v. Wilbanks*, 265 Ga. 555, 556, 458 S.E.2d 817, 818 (1995), on discovery sanctions, *Harwood v. Great Am. Management & Inv., Inc.*, 171 Ga. App. 488, 491, 320 S.E.2d 269, 272 (1984), and for excessive damages, *Lisle v. Willis*, 265 Ga. 861, 864, 463 S.E.2d 108, 110 (1995).

* * *

[Page 59, Argument and Citation of Authorities]

C. The Punitive Damages Are Excessive.

Finally, the $257 million punitive damages award is excessive and must be set aside or reduced. *See* O.C.G.A. § 51-12-12(a). This award is over *30* times larger than the largest punitive damages award ever paid in this state – the $8 million award where plaintiff's decedent was engulfed in a ball of fire caused by the defendant's knowing design of an automobile with an unsafe fuel system.

Ford Motor Co. v. Stubblefield, 171 Ga. App. 331, 319 S.E.2d 470 (1984).

Here, the $257 million was awarded primarily because Defendants installed a roller coaster three years later than Plaintiffs wished. This award violates the Excessive Fines Clause of the Georgia Constitution because, as in *Colonial Pipeline Co. v. Brown*, 258 Ga. 115, 365 S.E.2d 827 (1988),

[Page 60]

there is no "sensible relation between punishment and offense". *Id.* at 119-20, 365 S.E.2d at 831. Notably, Defendants' conduct involved no "personal injury or death" (or even a *risk* of injury or death). *Id.* at 122, 365 S.E.2d at 833. The punitive damages also violate the Due Process Clauses of the Georgia and United States Constitutions. As in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the injury here "was purely economic in nature", and Defendants' conduct "evinced no indifference to or reckless disregard for the health and safety of others". *Id.* at 576.

* * *

APPENDIX D

IN THE COURT OF APPEAL [*sic*]

STATE OF GEORGIA

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
SIX FLAGS ENTERTAINMENT CORPORATION,
SIX FLAGS THEME PARKS INC., and
SIX FLAGS OVER GEORGIA, INC.,

Appellants/Defendants,

-against-

SIX FLAGS OVER GEORGIA, LLC, SIX FLAGS FUND, LTD. (L.P.), and GEORGE DEROY, as Trustee of the Six Flags Claims Trust,

Appellees/Plaintiffs.

Appeal No. A00A0120

REPLY BRIEF OF APPELLANTS

[October 22, 1999]

Walt M. Britt
Georgia Bar No. 083237
Chandler & Britt, LLC
4350 South Lee Street
Buford, GA 30518
(770) 271-2991

Evan R. Chesler
Keith R. Hummel
Cravath, Swaine & Moore
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
(212) 474-1000

Attorneys for Appellants
Time Warner Entertainment
Company, L.P., Six Flags
Entertainment Corporation,
Six Flags Theme Parks Inc., and
Six Flags Over Georgia, Inc.

* * *

[page 29]

C. The Punitive Damages Are Excessive.

Plaintiffs incorrectly assert that the ratio of compensatory to punitive damages "insulates" the punitive damages award. The actual ratio is much higher than Plaintiffs claim because the compensatory damages award is itself grossly excessive. (Dft. Br. at 51-57) In any event, this ratio is *not* the legal standard for the validity of punitive damages. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996); *Hospital Auth. of Gwinnett County v. Jones*, 261 Ga. 613, 614, 409 S.E.2d 501, 502-03 (1991).

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This is not a case involving the risk of personal injury or death, or any widespread harm. It is a business dispute between two highly sophisticated parties involving a complex tax shelter. In this context, over a quarter of a *billion* dollars in punitives is excessive regardless of the "ratio" to compensatory damages. *See Colonial Pipeline Co. v. Brown*, 258 Ga. 115, 122-23, 365 S.E.2d 827, 833 (1988).

Finally, the goal of deterrence does not justify the punitive damages award because "less drastic remedies could be expected to achieve that goal". *BMW*, 517 U.S. at 584.

* * *

APPENDIX E

IN THE COURT OF APPEALS

STATE OF GEORGIA

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
SIX FLAGS ENTERTAINMENT CORPORATION,
SIX FLAGS THEME PARKS INC., and
SIX FLAGS OVER GEORGIA, INC.,

Appellants/Defendants,

-against-

SIX FLAGS OVER GEORGIA, LLC, SIX FLAGS FUND, LTD. (L.P.), and GEORGE DEROY, as Trustee of the Six Flags Claims Trust,

Appellees/Plaintiffs.

Appeal No. A00A0120

APPELLANTS' MOTION FOR RECONSIDERATION

[July 21, 2000]

Walt M. Britt
Georgia Bar No. 083237
Chandler & Britt, LLC
4350 South Lee Street
Buford, GA 30518
(770) 271-2991

Evan R. Chesler
Keith R. Hummel
Cravath, Swaine & Moore
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
(212) 474-1000

Attorneys for Appellants
Time Warner Entertainment Company, L.P.,
Six Flags Entertainment Corporation, Six Flags
Theme Parks Inc., and Six Flags Over Georgia, Inc.

* * *

[page 15]

XI. THE COURT SHOULD RECONSIDER ITS DECISION WITH RESPECT TO ENUMERATION OF ERROR NUMBERS TWELVE, THIRTEEN AND FOURTEEN.

The Court appears not to have considered controlling legal precedent cited by Defendants on pages 57-60 of their opening brief and 28-30 of their reply brief that mandate that the punitive damage award be stricken, or at least vastly reduced. In particular, we note the rule that, absent "circumstances of aggravation or outrage", *Tri-County Inv. Group, Ltd. v. Southern States, Inc.*, 231 Ga. App. 632, 638, 500 S.E.2d 22, 27-28 (1998), or fraud, *see Wilson Welding Serv. v. Partee*, 234 Ga. App. 619, 620, 507 S.E.2d 168, 170 (1998) (refusal to award punitive damages appropriate where there was no "significant amount of fraud"), punitive damages are not authorized. Further, the Court has overlooked the dictates of O.C.G.A. § 51-12-5.1, which requires that "specific intent to cause harm" had to be proved by clear and convincing evidence. O.C.G.A. § 51-12-5.1(b). The trial court's failure to instruct the jury on the standard of proof for the specific-intent finding was *per se* reversible error. *See Hammett v. Reynolds*, 243 Ga. 669, 671-72, 256 S.E.2d 354, 356-57 (1979). Finally, the Court has not, as is required by

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O.C.G.A. § 51-12-12(a), set aside the award as violating the Excessive Fines Clause of the Georgia Constitution because there is no "sensible relation between punishment and offense", *Colonial Pipeline Co. v. Brown*, 258 Ga. 115, 119-22, 365 S.E.2d 827, 831-33 (1988), and the Due Process Clauses of the Georgia and United States Constitutions, *see BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

* * *

APPENDIX F

2ND CIVIL NO.
B121917

In the Court of Appeal
OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

LIONEL SIMON, dba LIBERTY PAPER COMPANY,
Plaintiff and Respondent,

VS.

SAN PAOLO U.S. HOLDING COMPANY, INC.
Defendant and Appellant.

Appeal From
Superior Court of Los Angeles County
Honorable Richard P. Kalustian
BC152431

APPELLANT'S OPENING BRIEF

[November 17, 1998]

STEVEN N. RICHMAN
State Bar No. 101267
BETH ANN R. YOUNG
State Bar No. 143945
LAWRENCE A. ABELSON
State Bar No. 162407
EPPORT & RICHMAN, LLP
Attorneys at Law
10100 Santa Monica Boulevard
Suite 1450
Los Angeles, CA 90067-4118
(310) 785-0885

Attorneys for Defendant and Appellant San Paolo U.S. Holding Company, Inc.

* * *

[page 14, Standard of Review]

Third, as to the amount of the punitive damages awarded to SIMON, the standard of review is to determine if "the entire record viewed most favorably to the judgment indicates the award was rendered as the result of passion and prejudice." (*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 388, 202 Cal.Rptr. 204; internal citation omitted; *see also Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 927, 148 Cal.Rptr. 389.) The passion and prejudice inquiry is a species of the substantial evidence standard of review. (*Fortman v. Hemco, Inc.* (1989) 211 Cal.App.3d 241, 259, 259 Cal.Rptr. 311.)

Fourth, the determination of the constitutionality of a punitive damage award under the due process clause is reviewed on a *de novo* basis. (*See State of Ohio v. Barron* (1997) 52 Cal.App.4th 62, 67, 60 Cal.Rptr.2d 342, 344.)

* * *